



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2003

Mr. Peter G. Smith
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
500 North Akard, Suite 1800
Dallas, Texas 75201

OR2003-5928

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186493.

The City of Sachse (the "city"), which you represent, received a request for employment and insurance information relating to a deceased former employee of the city. You state that the city has released information relating to the employee's length of employment with the city. With respect to the request for insurance information, you indicate that the city sought clarification of the request from the requestor, and you have submitted a copy of the requestor's written response. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999) (discussing requests for clarification). You indicate that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

As a preliminary matter, we note that the submitted documents contain information pertaining to city employees other than the named individual at issue in the present request. We determine that this information, which we have marked, is not responsive to the present request and need not be released.

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d at 685. You indicate that the submitted documents consist of personal financial information relating to the named individual. As you acknowledge, this office has found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy).

In this case, however, you state that the individual at issue is deceased. We note that a person’s common-law right of privacy terminates upon death. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); See Attorney General Opinion JM-229 (1984) (“the right of privacy lapses upon death”), Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Thus, the submitted information may not be withheld on the basis of the decedent’s common-law right of privacy. However, if the release of information about a deceased person reveals highly intimate or embarrassing information about a living person, the information is protected by common-law privacy on the basis of the living person’s privacy interest. See Attorney General Opinion JM-299 (1984). In this regard, we note that the submitted documents contain beneficiary

information. A beneficiary has a common-law privacy interest in the financial information at issue. *See* Open Records Decision No. 373 at 3 (1983). Thus, to the extent the submitted information reveals the identity of a currently designated, living beneficiary, such information must be withheld pursuant to section 552.101 in conjunction with common-law privacy on the basis of the beneficiary's privacy interest. We have marked the submitted documents accordingly.

You also contend that the information at issue is protected from disclosure under sections 101.027 and 101.104 of the Civil Practice and Remedies Code. Section 101.027 provides for the purchase of liability insurance coverage by governmental units other than a unit of state government. Section 101.104 is the provision of the Civil Practice and Remedies Code concerning the discovery of insurance held by a governmental unit. *See* Civ. Prac. & Rem. Code §§ 101.027, .104. Accordingly, we consider your claim under section 101.104, which provides as follows:

- (a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].
- (b) Neither the existence nor the amount of the insurance is subject to discovery.

Section 101.104 provides that insurance information is not discoverable or admissible as evidence during litigation proceeding under the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code. *See City of Bedford v. Schattman*, 776 S.W.2d 812, 813-14 (Tex. App.--Fort Worth 1989, orig. proceeding) (protection from producing evidence of insurance coverage under section 101.104 is limited to actions brought under the Tort Claims Act). Section 101.104, however, is a civil discovery privilege and does not make insurance information expressly confidential for purposes of section 552.101.² *See* Open Records Decision No. 551 at 3 (1990) (provisions of section 101.104 "are not relevant to the availability of the information to the public"); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision Nos. 647 at 2 (1996) (information that may be privileged in the civil discovery context may not be withheld from disclosure pursuant to section 552.101 of the Government Code), 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under statutory predecessor to section 552.101). The Texas Supreme Court has determined that the discovery privileges found in the Texas Rules of Civil Procedure and the Texas Rules of Evidence "are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, section 101.104 of the Civil Practices and Remedies Code is not such a privilege. Thus, we determine that the information at issue may not be withheld from disclosure pursuant to section 552.101 in conjunction with section 101.104 of the Civil Practice and Remedies Code.

² Section 552.101 also encompasses information made confidential under other statutes.

You also contend that the decedent's home address and social security number are confidential. The home address, home telephone number, and family member information of the deceased individual may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) protects information relating to both "current and former" officials or employees, and applies if such individuals have elected pursuant to section 552.024 to keep their information confidential prior to the date the governmental body receives a request for the information. To the extent the deceased individual in this case elected, prior to the date the department received this request, to keep his home address, home telephone number, and family member information confidential, the city must withhold this information, which we have marked, pursuant to section 552.117(a)(1) of the Government Code. However, section 552.117 does not protect the social security number of a deceased employee. Thus, the social security number in the submitted documents may not be withheld on that basis.

We note that a social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* However, because the laws regarding the confidentiality of social security numbers are intended to protect the privacy of the individual, the city may not withhold the social security number of the deceased former employee on this basis.

In summary, we have marked beneficiary information that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. If the deceased former employee at issue timely elected to keep his home address, home telephone number, and family information confidential pursuant to section 552.024, then the city must withhold this information pursuant to section 552.117(a)(1) of the Government Code. With the exception of the information we have marked as non-responsive, the remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 186493

Enc: Submitted documents

c: Ms. Jyametra Robinson
12223 Quail Drive #474
Balch Springs, Texas 75180
(w/o enclosures)